

No. 08-559

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**In the Supreme Court  
of the United States**

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E. K. MCDANIEL, WARDEN AND THE ATTORNEY  
GENERAL OF THE STATE OF NEVADA,

*Petitioners,*

v.

TROY BROWN, *Respondent.*

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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF AMICI CURIAE STATES OF MICHIGAN,  
ALABAMA, ARIZONA, COLORADO, DELAWARE,  
HAWAII, IDAHO, KANSAS, MARYLAND,  
MISSOURI, NEW HAMPSHIRE, NEW MEXICO,  
NORTH DAKOTA, OHIO, PENNSYLVANIA,  
SOUTH CAROLINA, SOUTH DAKOTA, TEXAS,  
UTAH, WASHINGTON, WEST VIRGINIA, AND  
WYOMING IN SUPPORT OF PETITIONERS**

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## **QUESTION PRESENTED**

Amici will address the following question:

What is the standard of review for a federal habeas court analyzing a sufficiency-of-the-evidence claim under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)?

TABLE OF CONTENTS

QUESTION PRESENTED ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iv

INTEREST OF AMICI CURIAE ..... 1

INTRODUCTION AND SUMMARY OF ARGUMENT ..... 2

ARGUMENT ..... 4

In reviewing a sufficiency-of-the-evidence claim, a federal habeas court should first determine whether §2254(d) bars habeas relief because the State court decision was not objectively unreasonable before reaching the question whether in its independent view the evidence was sufficient. .... 4

A. It is both possible and consistent with the text of §2254(d) to determine whether habeas relief is barred because a State court decision was not objectively unreasonable before reaching the issue whether the underlying constitutional right was violated. .... 5

1. An examination of recent courts of appeals' cases demonstrates that a widespread practice of using a de novo determination of the sufficiency of the evidence to gauge the reasonableness of the State court decision, which has resulted in a thinly-veiled plenary review, contrary to the limitation of review created by §2254(d). .... 9

2. A State court is in the best position to conduct the sufficiency-of-the-evidence analysis under Jackson in a case arising out of State court conviction, and a habeas court's de novo determination that the evidence was insufficient does not speak to the reasonableness of the State court decision..... 12

3. Because §2254(d) gives State courts more leeway in reasonably deciding sufficiency-of-evidence claims since the test involves the application of a broad standard, there is little utility in having a habeas court add its own application of the standard to determine whether the State court's decision was reasonable..... 15

B. In this case, the court's decision to conduct a *de novo* review of Respondent's claim led it to erroneously grant habeas relief. A straightforward application of §2254(d) demonstrates that habeas relief should have been barred because the decision of the State court was not objectively unreasonable since it fell within the matrix of reasonable applications of the broad *Jackson* standard..... 19

CONCLUSION.....23

## TABLE OF AUTHORITIES

Page

## Cases

<i>Bates v. McCaughtry</i> , 934 F.2d 99 (7th Cir. 1991) .....	13
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004) .....	17
<i>Engle v. Issac</i> , 456 U.S. 107 (1982) .....	13
<i>Fiore v. White</i> , 528 U.S. 23 (1999) .....	12
<i>Garner v. Louisiana</i> , 368 U.S. 157 (1961) .....	12
<i>Hurtado v. Tucker</i> , 245 F.3d 7 (1st Cir. 2001).....	7
<i>Jackson v. Virginia</i> , 443 U.S. 307 (1979) .....	passim
<i>Knowles v. Mirzayance</i> , 556 U. S. ____ (2009) .....	16, 17
<i>Lockyer v. Andrade</i> , 538 U.S. 63 (2003) .....	5, 7, 8
<i>McFowler v. Jaimet</i> , 349 F.3d 436 (7th Cir. 2003) .....	11
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1965) .....	6
<i>Rompilla v. Beard</i> , 545 U.S. 374 (2005) .....	16
<i>Stone v. Powell</i> , 428 U.S. 465 (1976) .....	14

**Cases (continued)**

<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003) .....	16
<i>Williams v. Ozmint</i> , 494 F.3d 478 (4th Cir. 2007) .....	7
<i>Williams v. Taylor</i> , 529 U.S. 420 (2000) .....	9, 10, 11, 19
<i>Woodford v. Viscotti</i> , 537 U.S. 19 (2002) .....	15
<i>Wright v. West</i> , 505 U.S. 277 (1992) .....	17
<i>Yarborough v. Alvarado</i> , 541 U.S. 652 (2004) .....	passim

**Statutes**

28 U.S.C. §2254(d) .....	passim
28 U.S.C. §2254(d)(1) .....	15

**Other Authorities**

Antiterrorism and Effective Death Penalty....	12, 15, 18
Joseph L. Hoffman and William J. Stuntz, Habeas After the Revolution, 1993 Sup. Ct. Rev. 65, (1994) .....	15
Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229, 272 (1985) .....	15

**Rules**

Supreme Court Rule 37.4 .....	1
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## INTEREST OF AMICI CURIAE

Amici sovereign States routinely defend State court criminal convictions against federal habeas corpus challenges. 28 U.S.C. §2254(d) affords State courts the deference to which they are entitled in a system of federalism consistent with the limited role of federal collateral review. In this case, the United States Court of Appeals for the Ninth Circuit abandoned its obligation to defer to objectively reasonable State court decisions by conducting a thinly-veiled plenary review of a sufficiency-of-the-evidence claim that was rejected on the merits by the Nevada Supreme Court. If the process of analysis employed by the decision here is ratified by this Court it would undermine the States' interests in enforcing presumptively valid criminal convictions.

Amici States' interests are served by resolving the question presented as to the methodology that federal habeas courts must employ to ensure that the restrictions to review imposed by §2254(d) with respect to sufficiency-of-the-evidence claims are enforced. Amici submit this brief in support of the petitioner in this case, through their respective Attorneys General, under this Court's Rule 37.4.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This Court's decisions have demonstrated that it is both possible and consistent with the text of the statute for a habeas court to determine whether 28 U.S.C. §2254(d) bars habeas relief without determining whether the underlying constitutional right was violated. In order to prevent unwarranted plenary review of sufficiency-of-the-evidence claims, habeas courts should be required to determine whether §2254(d) bars relief because the State court decision was not objectively unreasonable, without using its own *de novo* determination of the merits of the claim to gauge the reasonableness of the State court decision. This methodology should be imposed for three reasons:

1. Allowing habeas courts to conduct a *de novo* review of the sufficiency of the evidence and use the result to gauge the reasonableness of the State court decision—which has been the typical methodology—has, effectively resulted in the abandonment of any meaningful limitation to review. An examination of recent courts of appeals' opinions following this methodology has revealed that *perceived erroneous* State court decisions are being equated with *unreasonable* ones. The standard in §2254(d) provides that even though a decision may be wrong is not a sufficient reason to grant habeas relief—but there is apparently only one published decision in which a court of appeals noted that the limitations imposed by §2254(d) actually made a difference in the outcome of a sufficiency-of-the-evidence claim.

2. State courts are in a better position than federal habeas courts to decide sufficiency-of-the-evidence claims arising out of State convictions. State-law questions—such as the elements that comprise a State crime and

the type of evidence that can be used to satisfy those elements—form the predicate to such claims. State courts are also more familiar with the quantum of evidence necessary to convince a presumably rational State jury to return a guilty verdict; State courts witness on a daily basis both the convictions and acquittals. And there is no reason to believe that State courts are less competent than federal courts to apply the sufficiency-of-the-evidence test.

3. State courts evaluating sufficiency-of-the-evidence claims apply a broad constitutional standard. Because §2254(d) gives State courts greater leeway in applying such standards, it compels a habeas court to defer to a wider range of State court decisions that reject sufficiency-of-the-evidence claims on the merits. A federal habeas court's *de novo* determination of the evidence's sufficiency merely gives the habeas court a single data-point on how another reviewing court might decide the issue. But because the data-point is the reviewing court's own product, there is a danger that it will be given unwarranted weight in determining the reasonableness of the State court decision.

The present case is emblematic of the problem. Not only did the district court fail to first determine whether §2254(d) barred relief, its false step led it to consider non-record evidence to aid its plenary review. The Ninth Circuit perpetuated the error by engaging in yet another finding that the evidence was insufficient and concluding for that reason that the contrary decision made by the State court was unreasonable. In fact, habeas relief should have been denied because the decision of the Nevada Supreme Court was not objectively unreasonable. The State court employed the correct constitutional standard and applied it to the facts of the case in a reasonable manner by reciting the

evidence—viewed most favorably to the prosecution—that supported the determination that Respondent was responsible for the crime.

### ARGUMENT

**In reviewing a sufficiency-of-the-evidence claim, a federal habeas court should first determine whether §2254(d) bars habeas relief because the State court decision was not objectively unreasonable before reaching the question whether in its independent view the evidence was sufficient.**

State courts occupy a superior position to federal habeas courts to determine the sufficiency of the evidence presented at a State criminal trial. State courts are expert in the State laws that form the legal predicate to such claims. And State courts have far more experience in the quantum of evidence that convince presumably rational State juries to convict or acquit a criminal defendant of State crimes. Also, the sufficiency-of-the-evidence test involves the application of a broad standard that gives a State court more leeway in rendering a reasonable decision. This Court's decisions demonstrate that it both possible and consistent with the text of 28 U.S.C. §2254(d) to determine whether habeas relief is barred because a State court decision was not objectively unreasonable before reaching the issue whether the underlying constitutional right was violated.

- A. It is both possible and consistent with the text of §2254(d) to determine whether habeas relief is barred because a State court decision was not objectively unreasonable before reaching the issue whether the underlying constitutional right was violated.

This Court has previously criticized habeas courts for determining whether a petitioner's constitutional rights were violated before determining whether habeas relief is barred by §2254(d) on other constitutional questions. In *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003), this Court disagreed with the approach taken by the Ninth Circuit of requiring federal habeas courts to review the State court decision *de novo* before applying §2254(d): "we do not reach the question whether the State court erred and instead focus solely on whether §2254(d) forecloses habeas relief on Andrade's Eighth Amendment claim." This Court went on to find that the State court decision was not objectively unreasonable irrespective of whether it was correct.

*Andrade* involved a claim that an application of California's "three-strikes" law violated the Eighth Amendment. This Court never determined whether the habeas petitioner's Eighth Amendment rights were in fact violated. Rather, after finding that clearly established Supreme Court law prohibited only sentences that were grossly disproportionate to the crime—the bounds of which were unclear—it found that the State court's conclusion was not objectively unreasonable.

Similarly, in *Yarborough v. Alvarado*, 541 U.S. 652, 665-666 (2004), this Court avoided deciding whether a habeas petitioner's constitutional rights were violated

because a straight-forward application of §2254(d) prevented it from reaching the question:

We cannot grant relief under AEDPA by conducting our own independent inquiry into whether the State court was correct as a *de novo* matter. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the State-court decision applied [the law] incorrectly." *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002) (per curiam). Relief is available under §2254(d)(1) only if the State court's decision is objectively unreasonable. See *Williams [v. Taylor]*, 529 U.S. 362 (2000) *supra*, at 410; *Andrade*, 538 U.S. at 75. Under that standard, relief cannot be granted.

*Yarborough* looked at the legal landscape regarding the right at issue—whether a suspect is being held in custody such that the warnings under *Miranda v. Arizona*, 384 U.S. 436 (1965), are required—and then it examined whether the decision of the State court reasonably comported with it. This Court noted that the State court applied the correct constitutional test and described the factors that led the State court to conclude that the suspect was not in custody. *Yarborough* did not first weigh the factors on its own, make a *de novo* determination whether the suspect was in custody, and then compare its result to the State court decision. It limited its review to determining whether the decision of the State court was a reasonable one:

These differing indications lead us to hold that the State court's application of our custody standard was reasonable. The

Court of Appeals was nowhere close to the mark when it concluded otherwise. Although the question of what is an "unreasonable application" of law might be difficult in some cases, it is not difficult here. The custody test is general, and the State court's application of our law fits within the matrix of our prior decisions.

541 U.S. at 665.

The methodology used in *Andrade* and *Yarborough*, provides a template for the standard that this Court should articulate for federal habeas courts to use in sufficiency-of-the-evidence cases. As a matter of review, this Court examined the legal standards identified by the State courts and the reasonableness of the application of the standards without an independent review of the constitutional issue itself. And in fact, a small minority of the decisions of the courts of appeals has applied a similar mode of analysis to sufficiency-of-the-evidence claims.

In *Hurtado v. Tucker*, 245 F.3d 7, 18-19 (1st Cir. 2001), the First Circuit limited its analysis to an examination of whether the State court decision evidenced an understanding of the *Jackson* standard and recited the evidence that supported its conclusion that the evidence was sufficient in a manner that was not objectively unreasonable. 245 F.3d at 18-19. The methodology avoided plenary review of the claim by focusing on the standard employed by the State court and reasonable manner in which it applied the standard to the facts of the case.

Likewise, in *Williams v. Ozmint*, 494 F.3d 478, 490 (4th Cir. 2007), the Fourth Circuit limited its review consistent with this approach. The only element of the crime disputed in *Ozmint* was venue. The petitioner argued that insufficient evidence was presented to prove that the crime occurred in South Carolina. In finding that the State court decision was reasonable, the Fourth Circuit noted that the State court decision pointed to the evidence that supported the jury's determination that the murders occurred in South Carolina. The Fourth Circuit did not make its own determination of the sufficiency of the evidence and compare it to the State court's conclusion. Rather, the habeas court limited its examination to a determination that the State court conducted a reasonable sufficiency-of-the-evidence analysis.

This Court stated in *Andrade* that "AEDPA does not require a federal habeas court to adopt any one methodology in deciding the only question that matters under § 2254(d)(1)—whether a State court decision is contrary to, or involved an unreasonable application of, clearly established Federal law." 538 U.S. at 71. But at least in the context of sufficiency-of-the-evidence claims, it is necessary for the methodology routinely employed by habeas courts—preceding the §2254(d) inquiry with a *de novo* review of the claim—to be revised. The change in methodology is warranted because: (1) recent federal courts of appeals' cases demonstrate that they have failed to limit review of sufficiency-of-the-evidence claims as required by §2254(d); (2) a State court is in a better position than a federal habeas court to conduct plenary consideration of sufficiency-of-the-evidence claims; and (3) §2254(d) gives a State court more latitude in deciding the claim, as the sufficiency-of-the-evidence test creates a broad standard.

1. **An examination of recent courts of appeals' cases demonstrates that a wide-spread practice of using a de novo determination of the sufficiency of the evidence to gauge the reasonableness of the State court decision, which has resulted in a thinly-veiled plenary review, contrary to the limitation of review created by §2254(d).**

Despite talismanic references to §2254(d), the section has made a difference in the outcome of perhaps only one published court of appeals' habeas decision reviewing a sufficiency-of-the-evidence claim. The vast majority of published cases in the courts of appeals since *Williams v. Taylor*, 529 U.S. 420 (2000), demonstrate that either the evidence is judged sufficient and the State court decision is therefore deemed *a fortiori* reasonable, or the evidence is judged insufficient and the State court decision is therefore found to be *ipso facto* unreasonable. There appears to be only a single reported court of appeals' case where the court suggested that the evidence was insufficient yet the State court decision was nevertheless reasonable. This is powerful evidence that the practice of using a *de novo* determination of the sufficiency of the evidence is ineffective as the first step in the review is ineffective in separating perceived erroneous applications of *Jackson v. Virginia*, 443 U.S. 307 (1979), with objectively unreasonable ones.

There are more than fifty reported courts of appeals' decisions since *Williams* in which a sufficiency-of-the-evidence claim has been denied on the merits on habeas review. In the vast majority of these decisions, the courts of appeals conducted their own *de novo* sufficiency-of-the-evidence review, determined the evidence to be sufficient, and then concluded in an *a fortiori* fashion that the State court result was

reasonable. *See* Appendix A. There are seven cases where the courts of appeals did not explicitly perform a *de novo* analysis, but the court's determination of reasonableness followed from an in-depth examination of the evidence as applied to State law. *See* Appendix B. There are only six cases in which it appears relief was denied without extensive factual analysis and based only on the reasonable form of the State court decision. *See* Appendix C. Therefore, in the vast majority of reported cases where relief was denied, the result was reached in conjunction with explicit or implicit plenary consideration of the sufficiency of the evidence.

On the other side of the ledger, there are at least thirteen reported courts of appeals' decisions where habeas relief was granted on a sufficiency-of-the-evidence claim after *Williams*. In eight of these cases, the courts of appeals followed their assessment that the evidence was insufficient with a determination that the State court decision was unreasonable for that reason alone. *See* Appendix D. In these cases, the courts of appeals equated an erroneous application of *Jackson* with an unreasonable one. In the other five cases in which relief was granted, the court found that the State court decision was not only erroneous but was also unreasonable because the evidence was wholly lacking or patently insufficient with respect to an element. *See* Appendix E. Nevertheless, in this group of cases the courts of appeals still conducted a plenary assessment of the sufficiency of the evidence as its first step in the review process and then compared it with the State court decision to determine its reasonableness.

There is a single reported court of appeals' case in which the court suggested that §2254(d) made a difference in the outcome. In *McFowler v. Jaimet*, 349 F.3d 436, 456-457 (7th Cir. 2003), the Seventh Circuit

found that in its view the evidence produced at trial might not support the verdict, but that the result reached by the State court was objectively reasonable:

[w]ere we reviewing McFowler's conviction on direct appeal, we might have reversed on the ground that no factfinder could find beyond a reasonable doubt that it was McFowler whom Meredith saw next to Logan's body with a shotgun in his hand . . . . But we do not sit in direct review of McFowler's conviction--it was the Illinois Appellate Court that filled that role. And the AEDPA demands that we give appropriate deference to the decision making authority of the State courts. We may not use the writ of habeas corpus to effectively overrule the decisions of those courts simply because we disagree with them.

Unlike *McFowler*, however, an examination of the reported courts of appeals' decisions since *Williams* reveals a willingness on the part of habeas courts to review sufficiency-of-the-evidence claims *de novo* and render a decision that comports with their independent view of the sufficiency of the evidence. Of the more than seventy reported decisions, in only one did the court of appeals' determination of reasonableness differ from its determination of the merits of the underlying claim. Even in the more than fifty cases in which relief was denied, the courts of appeals' plenary consideration of the sufficiency of the evidence exceeds the limitations on review of State court decisions imposed by §2254(d). Accordingly, the approach typically followed by habeas courts has failed to distinguish between perceived erroneous applications of *Jackson* with objectively

unreasonable ones. The methodology of review for the federal courts should accurately reflect the legal standards in AEDPA to give meaning to the distinction between erroneous decisions and unreasonable ones. The method typically used to date has proven to be ineffective at limiting habeas review as required by §2254(d).

2. **A State court is in the best position to conduct the sufficiency-of-the-evidence analysis under Jackson in a case arising out of State court conviction, and a habeas court's de novo determination that the evidence was insufficient does not speak to the reasonableness of the State court decision.**

*Jackson* requires a court reviewing a sufficiency-of-the-evidence claim to view the evidence in a light most favorable to the prosecution to determine whether any rational juror could have found the essential elements of the offense beyond a reasonable doubt. In the context of federal habeas review of a State court conviction, sufficiency-of-the-evidence claims are exceptional in that they are based on a number of State-law predicates that a federal court cannot question.

The elements of the crime that are subject to the beyond-a-reasonable-doubt standard are for the State courts alone to define. *Fiore v. White*, 528 U.S. 23, 29-30 (1999); *Garner v. Louisiana*, 368 U.S. 157, 166 (1961) ("We of course are bound by a State's interpretation of its own statute and will not substitute our judgment for that of the State's when it becomes necessary to analyze the evidence for the purpose of determining whether that evidence supports the findings of a State court.") A State may even elect to carry the burden of proof with respect

to a defense while insulating that portion of its case from habeas review by not designating the lack of the affirmative defense as an element of the crime. *Engle v. Issac*, 456 U.S. 107, 120-121 (1982).

Likewise, the type of evidence that can be considered to support those elements is a matter of State law. *Bates v. McCaughtry*, 934 F.2d 99, 103 (7th Cir. 1991) ("What is essential to establish an element, like the question whether a given element is necessary, is a question of State law. To say that State law 'rightly understood' requires proof of 'Z', and that the evidence is insufficient because the prosecution failed to establish this, is to use *Jackson* as a back door to review of questions of substantive law.")

The only federal question is a quantitative one: given how the State court defines the elements of the crime and given the type of evidence the State court views as probative of those elements, was there enough evidence presented to satisfy the *Jackson* standard? A habeas court assessing a sufficiency-of-the-evidence claim arising out of a State court conviction is, therefore, at a disadvantage. It cannot make authoritative statements with respect to the first half of the inquiry concerning the elements of the crime or the type of evidence that can support them, because it must defer completely to the State court's interpretation of its own law.

On top of this legal disadvantage lies the fact that the State courts are asked to weigh the sufficiency of the evidence presented at State criminal trials on a daily basis. When a State trial court is asked to decide a motion for a directed verdict of acquittal or a motion JNOV, it performs its task with a great deal of experience regarding the quality and quantity of

evidence that in fact tends to satisfy a jury beyond a reasonable doubt. A seated jury is presumed to be rational, and a busy State trial court has daily first-hand experience on the verdicts that typically result from various evidentiary profiles. A federal habeas court sees only a small sub-set of criminal cases that were tried in State court and reviewed by a State appellate court.

In *Stone v. Powell*, 428 U.S. 465, 493-94 n.35 (1976), the Court noted that federal courts are no more expert than State courts in deciding search-and-seizure claims because both courts deal with such claims on a daily basis. The observation is truer with sufficiency-of-the-evidence claims: State courts routinely handle sufficiency-of-the-evidence claims predicated on State-defined crimes on direct appeal, whereas federal courts only see a smaller number of such claims arising out of State-defined crimes on habeas review.

Accordingly, when a federal habeas court conducts its own *de novo* review of a sufficiency-of-the-evidence claim, the result does not provide the most useful gauge as to the reasonableness of the State court decision. The habeas court does not occupy a position that is as good as the State court does to perform the *de novo* analysis: the State court is the expert in its own laws that form the predicate to the claim, and the State court more routinely engage in the quantitative half of the analysis. The determination by the habeas court that it views the evidence as insufficient may only constitute another data point on the matrix of reasonable results. The federal habeas court's *de novo* disagreement with the result does not resolve the issue whether the State court decision was objectively unreasonable.

The view that a State court might be less willing than a federal court to apply federal law in favor of a criminal defendant ignores the premise upon which AEDPA was based. The "readiness to attribute error [to a State court] is inconsistent with the presumption that State courts know and follow the law." *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002) (per curiam); Joseph L. Hoffman and William J. Stuntz, *Habeas After the Revolution*, 1993 Sup. Ct. Rev. 65, 111 (1994) ("The notion that State courts as a whole are strongly pro-government in criminal procedure disputes seemed plausible thirty years ago, but it is a hard sell [in 1994] ... . There is no good evidence (and it is hard to see how one would go about really testing the point), but it seems more plausible to believe that State court criminal procedure errors are distributed about equally on both sides of the constitutional line."); See also Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 272 (1985) ("The premise that State courts are to be suspected of distorted factfinding and law application is disquieting. After all, the Constitution presupposes that the State courts will enforce declared federal law fairly.").

3. **Because §2254(d) gives State courts more leeway in reasonably deciding sufficiency-of-evidence claims since the test involves the application of a broad standard, there is little utility in having a habeas court add its own application of the standard to determine whether the State court's decision was reasonable.**

This Court interpreted the unreasonable application prong of §2254(d)(1) in *Williams* as requiring habeas courts to defer to State court applications of federal law that are not "objectively unreasonable." In

*Rompilla v. Beard*, 545 U.S. 374, 380 (2005)(quoting *Wiggins v. Smith*, 539 U.S. 510, 520 (2003)), this Court Stated that an "unreasonable application" occurs when a State court "identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of petitioner's case."

This Court has also consistently drawn a distinction between State court decisions applying a broad constitutional standard and ones that apply a narrow rule. As explained in *Yarborough*, where a general standard is at issue, State court decisions are given greater leeway:

[i]f a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.

541 U.S. at 664.

In *Knowles v. Mirzayance*, 556 U. S. \_\_\_\_ (2009), the Court held that ineffective-assistance-of-counsel claims must be given extra latitude in light of the general nature of the rule: "because the *Strickland* standard is a general standard, a State court has even

more latitude to reasonably determine that a defendant has not satisfied that standard."

The standard for sufficiency-of-the-evidence claims constitutes another general rule which, under *Yarborough* and *Knowles*, requires federal courts to allow the States considerably more leeway in its application. As Justice Kennedy stated in his concurring opinion in *Wright v. West*, 505 U.S. 277, 308 (1992)(Kennedy, J., concurring in the judgment), *Jackson* articulates a standard which requires a fact-specific analysis:

*Teague* does bear on applications of law to fact which result in the announcement of a new rule . . . . If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule. The rule of *Jackson v. Virginia* . . . is an example.

Where an issue involves the application of a narrow rule – perhaps for example what constitutes "testimonial hearsay" under *Crawford v. Washington*, 541 U.S. 36 (2004) – the range of reasonable outcomes is limited and there is arguably substantial value in comparing the independent review of the habeas court to the State court to determine reasonableness. But there is limited value in the practice of a habeas court seeking to determine the reasonableness of a state court decision regarding the sufficiency of the evidence by comparing the state court decision with its own *de novo* determination. As this Court stated in *Yarborough*, "[a]pplying a general standard to a specific case can demand a substantial element of judgment."

Thus, a habeas court's own view of the sufficiency of the evidence is just another judgment in the matrix of possible decisions. It is a single data point that has limited bearing on where the State court decision rests in that matrix. And, as previously noted,, it is a data point being placed by a court that does not have the same degree of authority over the States' law making the *de novo* determination. The more general the rule, the less relevant the habeas court's independent view of the claim becomes. And it is difficult to think of a claim that employs a constitutional standard more general than *Jackson*, which asks broadly whether any rational fact-finder could find elements beyond a reasonable doubt.

Thus, the methodology this Court should require in sufficiency-of-the-evidence cases is to mandate that the reviewing habeas court first look to the standard used by the State court, and then second examine the State court's application of the facts to that standard. This analysis of the facts is not an independent review. The review of the State's application examines the legal reasoning—the facts cited, whether these facts were supported by the record, whether the inferences from them were within the range of reasonable conclusions, and whether the application of the standards correlated to the facts. By doing so, this Court would require the reviewing court to examine the process of analysis by the State courts—such a methodology would honor and give meaning to the distinction between a decision that may be erroneous and an objectively unreasonable one. Without such guidance, the reality of review is, in effect, a *de novo* review with some citations to the legal standards of AEDPA where the limitations created by §2254(d) play no meaningful role in the decision.

- B. In this case, the court's decision to conduct a *de novo* review of Respondent's claim led it to erroneously grant habeas relief. A straightforward application of §2254(d) demonstrates that habeas relief should have been barred because the decision of the State court was not objectively unreasonable since it fell within the matrix of reasonable applications of the broad *Jackson* standard.**

This case vividly demonstrates the danger of allowing a habeas court to give plenary consideration to a sufficiency-of-the-evidence claim before determining whether §2254(d) bars relief.

The district court's consideration of Respondent's sufficiency-of-the-evidence claim exceeded the bounds of review contemplated by §2254(d). Not only did the district court conduct a plenary review of the claim before making an *ipso facto* determination that the State court decision was therefore unreasonable, it also considered new evidence to aid it. That is, the district court discarded the constraints on review placed on a habeas court and put itself in the role a State court—albeit without the expertise in State law and without the same degree of experience in reviewing State criminal trials—and asked itself whether the prosecutor had presented sufficient evidence. The Ninth Circuit perpetuated the error, and after making another finding that the evidence was insufficient, it also found *ipso facto* that the Nevada Supreme Court decision was unreasonable.

The plenary consideration of the evidence's sufficiency should not have occurred. This is because a straightforward application of the *Williams* standard demonstrates that the Nevada Supreme Court's decision

was not objectively unreasonable, and relief was therefore barred under §2254(d). Here, the State court identified the correct constitutional test and compared the record evidence to the challenged element in a manner that reasonably fit within the matrix of reasonable decisions allowed by the broad *Jackson* standard.

First, the State court plainly employed the correct test. It stated that the question was "whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt." For the reasons stated in Petitioner's brief, there is no principled distinction between a "reasonable acting jury" and a "rationale fact-finder." The terms are equivalent and both speak to a fact-finder that makes a reasoned rather than an arbitrary decision. Likewise, the State court correctly acknowledged that the burden of proof was "beyond a reasonable doubt."

Next, the State court—viewing the evidence in the light most favorable to the prosecution—did not unreasonably determine that a rational fact-finder could have found proof of the challenged elements of the offense beyond a reasonable doubt. The only element of the crime at issue was that of identity. Respondent did not contend that any of the other elements had not been proven, and it is not unreasonable for a reviewing court to fail to address issues that are not raised.

The State court then cataloged the evidence that, in its view, allowed the jury to find the element of identity beyond a reasonable doubt. Evidence established that Respondent was located in sufficient proximity to the victim's house to have committed the crime. The victim's testimony that her attacker was dressed in a particular way and smelled like beer and vomit meshed

with the evidence that Respondent was dressed accordingly and in fact had been drinking and vomiting on the night of the assault. Evidence was presented that someone resembling Respondent was seen stumbling on the road near the victim's house very near the time of the assault. And finally, the DNA evidence indicated that Respondent's DNA matched the semen stain found in the victim's underwear, only 1 in 3,000,000 people would have matching DNA, and even the second DNA test indicated that only 1 in 10,000 people had matching DNA.

The State court decision evidences an application of the *Jackson* standard that was not objectively unreasonable. The Court recited the evidence in the light most favorable to the prosecutor that it viewed as supporting the disputed element. The Court then made the reasoned decision that the evidence was sufficiently persuasive to meet the constitutional threshold. That is, the Nevada Supreme Court's application of *Jackson* was not objectively unreasonable. And as such, §2254(d) bars Petitioner from habeas relief, whether or not the State court decision was correct. There is no reason that the Ninth Circuit, years after the fact, was better situated than the State courts to make that necessary judgment call.

The present case demonstrates the need to define a methodology for federal habeas courts to use in deciding sufficiency-of-the-evidence cases. To determine whether relief is foreclosed by §2254(d), a habeas court should first ask whether the State court applied the correct constitutional standard. The habeas court should then examine the State court's application of the standard. This second step involves an examination of the State's legal reasoning rather than a comparison of *de novo* results. If the State court accurately described

the evidence, drew inferences from the evidence that were within the range of reasonable conclusions, and applied the *Jackson* standard in way that was reasonably correlated to the facts, its adjudication of the claim was not objectively unreasonable. Such a methodology would allow a real distinction to be drawn between State court decisions that may be viewed as erroneous merely because the habeas court would have reached a different result, and State court decisions that are objectively unreasonable. If the practice employed by the district court and Ninth Circuit in this case is allowed to stand, then the limitations required by §2254(d) will play no meaningful role in the deciding of sufficiency-of-the-evidence claims.

**CONCLUSION**

The decision of the court of appeals should be reversed.

Respectfully submitted

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## APPENDIX A

**2009**

*Curtis v. Montgomery*, 552 F.3d 578, 583  
(7th Cir. 2009)

**2008**

*Coronado v. Ward*, 517 F.3d 1212, 1217  
(10th Cir. 2008)

*Eady v. Morgan*, 515 F.3d 587, 596 (6th  
Cir. 2008)

*Saxton v. Sheets*, 547 F.3d 597, 606 (6th  
Cir. 2008)

*Tucker v. Palmer*, 541 F.3d 652, 661 (6th  
Cir. Mich. 2008)

*Wilson v. Sirmons*, 536 F.3d 1064, 1106-  
1108 (10th Cir. 2008)

**2007**

*Geboy v. Brigano*, 489 F.3d 752, 764 (6th  
Cir. 2007)

*Getsy v. Mitchell*, 495 F.3d 295, 317 (6th  
Cir. 2007)

*Hartman v. Bagley*, 492 F.3d 347, 370 (6th  
Cir. 2007)

*O'Hara v. Brigano*, 499 F.3d 492, 500 (6th  
Cir. 2007)

*Riley v. Berghuis*, 481 F.3d 315, 324 (6th  
Cir. 2007)

*Skillicorn v. Luebbers*, 475 F.3d 965, 978  
(8th Cir. 2007)

*Young v. Sirmons*, 486 F.3d 655, 670 (10th  
Cir. 2007)

**2006**

*Kater v. Maloney*, 459 F.3d 56, 68 (1st Cir.  
2006)

**2005**

*Boltz v. Mullin*, 415 F.3d 1215, 1232-1233  
(10th Cir. 2005)

*Jordan v. Hurley*, 397 F.3d 360, 362 (6th  
Cir. 2005)

*Parker v. Scott*, 394 F.3d 1302, 1315 (10th  
Cir. 2005)

*Patton v. Mullin*, 425 F.3d 788, 796 (10th  
Cir 2005)

*Sera v. Norris*, 400 F.3d 538, 546 (8th Cir.  
2005)

*Tinsley v. Million*, 399 F.3d 796, 815 (6th  
Cir. 2005)

**2004**

*Bruce v. Terhune*, 376 F.3d 950, 957 (9th  
Cir. 2004)

*Conklin v. Schofield*, 366 F.3d 1191, 1201  
(11th Cir 2004)

*Davis v. Woodford*, 384 F.3d 628, 641 (9th  
Cir. 2004)

*Trejo v. Hulick*, 380 F.3d 1031 (7th Cir.  
2004)

*Valdez v. Bravo*, 373 F.3d 1093, 1098 (10th  
Cir. 2004)

*Webber v. Scott*, 390 F.3d 1169, 1179 (10th  
Cir. 2004)

**2003**

*Cargle v. Mullin*, 317 F.3d 1196, 1225 (10th Cir. 2003)

*Davis v. Woodford*, 333 F.3d 982, 994 (9th Cir. 2003)

*Matthews v. Abramajtys*, 319 F.3d 780, 789 (6th Cir. 2003)

*Moore v. Casperson*, 345 F.3d 474, 488-489 (7th Cir. 2003)

*Torres v. Mullin*, 317 F.3d 1145, 1156 (10th Cir. 2003)

*Whitehead v. Dormire*, 340 F.3d 532, 537 (8th Cir. 2003)

**2002**

*Gilbert v. Mullin*, 302 F.3d 1166, 1181 (10th Cir. 2002)

*Hayes v. Woodford*, 301 F.3d 1054, 1085-1086 (9th Cir. 2002)

*Martin v. Mitchell*, 280 F.3d 594, 618 (6th Cir. 2002)

*Romano v. Gibson*, 278 F.3d 1145, 1155 (10th Cir. 2002)

*Sanford v. Yukins*, 288 F.3d 855, 863 (6th Cir. 2002)

*Scott v. Elo*, 302 F.3d 598, 603 (6th Cir. 2002)

*Turner v. Calderon*, 281 F.3d 851, 884 (9th Cir. 2002)

*Wiggins v. Corcoran*, 288 F.3d 629, 637 (4th Cir. 2002)

**2001**

*May v. Iowa*, 251 F.3d 713, 717 (8th Cir. 2001)

*Romano v. Gibson*, 239 F.3d 1156, 1165 (10th Cir. 2001)

**2000**

*Loeblein v. Dormire*, 229 F.3d 724, 726 (8th Cir. 2000)

*Mayes v. Gibson*, 210 F.3d 1284, 1293 (10th Cir. 2000)

*Oken v. Corcoran*, 220 F.3d 259, 269 (4th Cir. 2000)

**1999**

*Moore v. Gibson*, 195 F.3d 1152, 1177 (10th Cir. 1999)

**APPENDIX B**

*Gonzalez v. Knowles*, 515 F.3d 1006, 1011-1012 (9th Cir. 2008)

*Gonzales v. Tafoya*, 515 F.3d 1097, 1127 (10th Cir. 2008)

*Spears v. Mullin*, 343 F.3d 1215, 1240 (10th Cir. 2003)

*Johnson v. Bett*, 349 F.3d 1030, 1035 (7th Cir. 2003)

*Sexton v. Kemna*, 278 F.3d 808, 814 (8th Cir. 2002)

*Santellan v. Cockrell*, 271 F.3d 190, 196 (5th Cir. 2001)

*Valdez v. Ward*, 219 F.3d 1222, 1238 (10th Cir. 2000)

**Appendix C**

*Williams v. Ozmint*, 494 F.3d 478, 489 (4th Cir. 2007)

*Biros v. Bagley*, 422 F.3d 379, 392 (6th Cir. 2005)

*Evans v. Luebbbers*, 371 F.3d 438, 442 (8th Cir. 2004)

*Fields v. Gibson*, 277 F.3d 1203, 1222 (10th Cir. 2002)

*Martinez v. Johnson*, 255 F.3d 229, 245 (5th Cir. 2001)

*Hurtado v. Tucker*, 245 F.3d 7, 18 (1st Cir. 2001)

**Appendix D**

*Briceno v. Scribner*, 2009 U.S. App. LEXIS 3524 (9th Cir. Cal. Feb. 23, 2009)

*Newman v. Metrish*, 543 F.3d 793, 797-798 (6th Cir. 2008) ("[W]here the evidence taken in the light most favorable to the prosecution creates only a reasonable speculation that a defendant was present at the crime, there is insufficient evidence to satisfy the *Jackson* standard. Accordingly, we conclude that the Michigan Court of appeals unreasonably applied clearly established federal law and the decision of the district court granting a writ of habeas corpus is affirmed.")

*Perez v. Cain*, 529 F.3d 588, 599 (5th Cir. 2008) ("The State produced insufficient evidence solely through cross-examination and argument to controvert Perez's claim. We therefore conclude that Perez established by a preponderance of the evidence that he was insane and that the State appellate court's conclusion that a rational jury could have found otherwise was an objectively unreasonable application of federal law.")

*Brown v. Palmer*, 441 F.3d 347, 352 (6th Cir. 2006)

*Goldyn v. Hayes*, 444 F.3d 1062 (9th Cir. 2006)

*Torres v. Lytle*, 461 F.3d 1303, 1313 (10th Cir. 2006)

*Piaskowski v. Bett*, 256 F.3d 687, 693-694 (7th Cir. 2001) ("Having determined that no rational jury could convict Piaskowski, little further analysis is required to confirm Judge Gordon's conclusion that the Wisconsin Court of appeals' decision was an unreasonable application of the law as determined by the Supreme Court in *Jackson*.")

*Thomas v. Gibson*, 218 F.3d 1213, 1229 (10th Cir. 2000) ("Because the OCCA's sufficiency finding as to the heinous, atrocious, or cruel aggravator is based exclusively on its Stated inference, and because the drawing of that inference is clearly unreasonable in light of the undisputed contrary trial testimony of the State medical examiner, this court concludes that no rational fact finder could have found the existence of the aggravator beyond a reasonable doubt. Because the only aggravating circumstance advanced by the State of Oklahoma at trial is not supported by sufficient evidence, Thomas' death penalty cannot stand.")

**Appendix E**

*Parker v. Renico*, 506 F.3d 444, 452 (6th Cir. 2007)("Here, viewed individually each fact the State advances as "indicia of control" fails to link Parker to the gun, and viewed cumulatively the evidence gains no greater traction. The evidence may have led the jury, as Brown contemplates, to "reasonably speculate" that Parker possessed a weapon, but without "indicia of control," insufficient evidence supports beyond a reasonable doubt Parker's constructive possession. Although *Jackson v. Virginia* and AEDPA dictate deferential standards, this is the rare case where the jury's conclusion fails to conform to that of a rational jury, and where the Michigan Court of Appeals' contrary conclusion was unreasonable.")

*Joseph v. Coyle*, 469 F.3d 441, 456 (6th Cir. 2006)("In light of the . . . total absence of such proof . . . we conclude that the Ohio Supreme Court's decision was an unreasonable application of the due-process standard of *Jackson v. Virginia*.")

*Smith v. Mitchell*, 437 F.3d 884, 890 (9th Cir. 2006) (" With all due respect to the California Court of Appeal, and even with the additional layer of deference mandated by AEDPA, we conclude that the Court of Appeal unreasonably applied *Jackson* when it held the evidence to be sufficient to convict Smith of causing Etzel's death. There was simply no demonstrable support for shaking as the cause of death. As a result of the unreasonable application of *Jackson*, there has very likely been a miscarriage of justice in this case.")

*Garcia v. Carey*, 395 F.3d 1099, 1104-1105 (9th Cir. 2005) ("Without this evidentiary link, it is unreasonable to conclude that a rational jury could find that Garcia committed this robbery with the specific intent to facilitate other gang crimes. There was simply a total failure of proof of the requisite specific intent. The district court correctly granted habeas relief on the gang enhancement, and on the firearm enhancement that depended on it.")

*Juan H. v. Allen*, 408 F.3d 1262, 1277 (9th Cir. 2005) ("The California Court of Appeal decision affirming the conviction of Juan H. was an unreasonable application of the Fourteenth Amendment requirement that the prosecution present evidence sufficient to prove every element of a crime beyond a reasonable doubt. . . . The record contains manifestly insufficient evidence.")